NO. 48450-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL SEGALINE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES and ALAN CROFT,

Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

As the three part test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), indicates, what process is due is context driven and multi-faceted such that the outcome of the analysis must be determined case by case based upon the balancing of interests. Since this analysis is case specific, the outcome in any given case is rarely going to be clearly established. Yet, this is exactly what qualified immunity requires: context specific case law clearly establishing the amount of process that is due. The plaintiff has the burden of demonstrating the existence of such case law. The closest Segaline can come is to point to libraries and public schools, not a government permitting office.

The trial court agreed that the due process requirements for a no trespass notice from a government permitting office were not clearly established in 2003. However, the trial court inexplicably allowed the jury to decide the amount of due process that was required for the issuance of the no trespass notice. This was error because, (1) the amount of due process required for the issuance of a no trespass notice on a government building in 2003 was not clearly established, and (2) whether the law was clearly established and the amount of process that was due are issues of law for the court to decide, not a jury.

While Segaline seeks to make this appeal about the right to practice one's occupation and licensing deprivation, his ability to obtain permits was never denied.

There was no case law in 2003 clearly establishing the process that was due for the issuance of a no trespass notice from a government permitting office, and therefor Alan Croft is entitled to qualified immunity as a matter of law.

II. ISSUES ADDRESSED ON REPLY

1. Whether the plaintiff met his burden of establishing that the law was clearly established in 2003 such that every reasonable official would know the amount of process due for the issuance of a no trespass notice from a government permitting office.

2. Whether the trial court erred in analyzing qualified immunity as a factual issue, and allowing the jury to decide that issue when qualified immunity is a question of law for the court to decide.

3. Whether the trial court erred in allowing the jury to decide the amount of process that was due for the issuance of a no trespass notice from a government permitting office, when the determination of what is constitutionally required by the due process clause is a question of law for the court to decide.

4. Whether Alan Croft preserved the error in Jury Instruction No. 13 when he argued that the instruction failed to define due process, and in fact submitted an instruction that did define due process, which the trial court did not give?

III. ADDITIONAL RELEVANT FACTS

A. Segaline's Business Did Not Suffer

Segaline implies that the issuance of the no trespass notice interfered with his ability to obtain permits. Respondent's Brief (Resp't's Br.) at 21-22. He further claims that Croft knew this; he was interfering with Segaline's right to purchase permits in order to practice his business. Resp't's Br. at 33.[1] Yet, Segaline was not prohibited from conducting his electrical business. Segaline testified that after the trespass notice was issued he obtained permits from L&I, who even processed a permit request in less than five minutes. Report of Proceedings (RP) 260. The unchallenged testimony of L&I's economist established that Segaline obtained, on average, as many permits after the trespass notice as before (yearly average 42.5 permits, year after incident 42 permits). RP 873, 851. As the economist and L&I employees testified, Segaline could obtain permits online or have an employee go to the L&I office. RP 844, 872-73

[1] Segaline also cites the case of *Nguyen v. State Dep't of Health Med. Quality Assur. Ins. Comm'n*, 144 Wn.2d 516, 29 P.3d 689 (2001), a case that dealt with the standard of proof for the revocation of a doctor's license to practice medicine.

(Partin), 733 (Guthrie), 413 (Croft). Segaline was capable of earning more money after the incident than he was the year before the incident, but made other less profitable decisions. RP 843-44, 848. There was no objective basis for any income loss to Segaline based on the issuance of the no trespass notice. RP 873.

B. L&I Employees Documented and Reported They Felt Harassed

Contrary to Segaline's portrayal of the record, Segaline's behavior led L&I employees to feel harassed, which L&I employees documented in incident reports. Documentation of Segaline's behaviors was not isolated to a single employee. RP 410. Just the opposite, Segaline's behavior was documented by three separate employees who each felt harassed (Hawkins, Guthrie, and Sanchez), spanning line level employees to a supervisory level employee. RP 410. Segaline admitted pronouncing to L&I employees, "if it costs you your job," "if I wind up dead," and "a lot of people would be behind bars." RP 250-51. Croft exercised his judgment as the L&I Safety and Health Coordinator and determined Segaline's verbal statements, evasive and bizarre actions, and escalating behavior amounted to harassment of L&I employees and L&I employees needed protection from Segaline. RP 415, 424. The jury found these concerns to be credible given that Segaline lost on the malicious prosecution claim against L&I.

C. Croft Provided a Pre-Deprivation Hearing at the June Meeting Where Segaline Decided to Terminate the Meeting by Refusing to Cooperate

Croft and Whittle attempted to provide Segaline notice of his disruptive behavior and an opportunity to address his disruptive behavior. However, Segaline refused to listen or discuss his conduct and became more disruptive. RP 253, 256. Specifically, the June 19 meeting presented an opportunity for Segaline to hear the concerns of L&I, for Segaline to express his concerns, and the parties to reach a meeting of the minds. However, despite that opportunity, Segaline's behavior devolved. On June 19, Segaline refused to consider alternatives for dealing with L&I and insisted that he would continue to conduct business in the way he always had. RP 399. Croft observed that Segaline's body language did not match his words and believed he was about to explode. RP 381 ("like a balloon about to pop"). The meeting ended after Segaline became fixated on the legality of recording conversations, would not discuss a resolution to do business civilly, and further disrupted the L&I office by demanding to speak with an unavailable L&I employee. RP 257, 398-99.

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IV. ARGUMENT

A. Plaintiff Failed to Establish That Every Reasonable Official Would Have Known the Process Afforded Segaline Was Constitutionally Inadequate

A determination of what process is due is context specific and multi-faceted such that the outcome of the analysis must be determined case by case based upon the balancing of interests. *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). The outcome is rarely going to be clearly established given the balance of interests. "While the right to due process is 'clearly established' by the Due Process Clause, this level of generality was not intended to satisfy the qualified immunity standard. Rather, courts must look to the *Mathews* test." *Brewster*, 149 F.3d at 983 (quoting *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100 (9th Cir. 1995)). "Not only does the *Mathews* inquiry require a delicate balancing of several competing interests, it requires that balancing at several separate stages of the procedural due process calculus." *Brewster*, 149 F.3d at 983. At its core, due process requires the person be given an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 984 (internal citations omitted).

Segaline's reliance on *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), fails to recognize that due process is flexible and

the amount of due process varies from case to case. Resp't's Br. at 22. In *Goss*, public school students via class action sought review of their school suspensions imposed without a hearing. *Goss*, 419 U.S. at 565. Plaintiffs sought injunctive relief and the case did not involve whether the school officials had qualified immunity. *Id.* Segaline glosses over the context driven, flexible nature of due process analyzed in that case, which included the right to an education, the state requirement to attend school, and that the suspension was not de minimus. *Id.* at 577. The Supreme Court held that in this context due process required notice to the student, an explanation, and opportunity to present the student's story. *Id.* at 581.

Subsequent case law supports the proposition that Croft provided adequate due process, or at the very least that it was not clear that the process provided was not sufficient. In *Gardner v Evans,* 811 F.3d 843, 845 (6th Cir. 2016), building inspectors were entitled to qualified immunity because any constitutional inadequacies in eviction notices would not have been apparent to reasonable officials. *Gardner*, 811 F.3d at 845. The plaintiffs failed to satisfy that a constitutional notice requirement was clearly established. *Gardner*, 811 F.3d at 845. "A diversity of precedent highlights this general lack of clarity regarding the notice requirement for a post-deprivation appeals process." *Id.* at 848. Further,

> [T]here are no bright-line rules regarding how such notice must be given or how many details it must include. Rather, the sufficiency of notice requires a fact-based analysis that seeks to determine whether the notice is "reasonably calculated to inform the Plaintiffs of the allegations against them and provide a means for responding to the allegations."

Gardner, 811 F.3d at 847 (quoting *Silvernail v. Cty. of Kent*, 385 F.3d 601, 605 (6th Cir. 2004).

In *Gardner*, inspectors issued eviction notices but did not provide notice of appeal rights as specifically set forth in municipal code. Rather, the inspectors simply provided a phone number to contact them about questions. This case distinguished a prior case, *Flatford*, on which Segaline relies in his briefing. Resp't's Br. at 32-33. (In *Flatford* a building inspector failed to provide any due process. *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994).)

Here, Croft provided for a method of contacting the Department to discuss the no trespass notice and how to have it terminated. Clerk's Papers (CP) 959 (the no trespass notice stated: "Trespassed for: disruptive behavior, harassment of staff and failure to follow instructions for contacting the department. . . . To have this notice terminated, the subject must secure the written approval of David Whittle. . . .").

The case law is not so clear as to render Croft's actions unreasonable in providing the meeting on June 19, or the no trespass

notice itself as unreasonably calculated to inform Segaline of his disruptive behavior and the means to lift the no trespass notice by contacting Whittle. A reasonable person would have known that the June 19 meeting was about L&I staff feeling harassed and to discuss options for Segaline to cooperate with L&I staff. The fact that Segaline failed to avail himself of that opportunity at the meeting or any other time does not mean it was not adequate due process under the circumstances.

Adequate due process hinges on the context. Here, the context is Segaline's disruptive behavior in the L&I lobby as employees attempted to administer the statutorily mandated array of industrial insurance programs and services. There are no clearly established constitutional protections for the context of this case. Contrary to Segaline's assertion, behavior does not have to rise to the level of physically threatening to be a lawful reason to exclude someone from an office. *See* Resp't's Br. at 20. Unlawful behavior or behavior that unreasonably interferes with the public use of a building are lawful reasons to exclude a patron, especially when it disrupts services to the rest of the public. In fact, even in indisputably public gathering places "[p]rohibiting disruptive behavior is perhaps the clearest and most direct way to achieve maximum Library use" *Spreadbury v. Bitterroot Pub. Library*, 862 F. Supp. 2d 1054, 1057 (D. Montana 2012) (quoting *Kreimer v Bureau of Police for the Town of Morristown*, 958

F.2d 1242, 1263 (3rd Cir. 1992)). The same can be said of an L&I office. Prohibiting disruptive behavior is the clearest and most direct way to achieve L&I's mission of providing services for workers' compensation claims, administering electrical permits, and providing any other service an L&I patron seeks, plus protecting employees from harassment.[2]

In *Spreadbury*, the public library banned a library patron from the library because he intimidated library staff and patrons twice. *Spreadbury*, 862 F. Supp. 2d at 1056. Plaintiff was given written notice he was banned, was told the reason why, and was afforded an opportunity to be heard. *Id.* at 1057. The court determined that was adequate procedural due process. *Id* at 1056. The court also found that the library was not required to follow the specific procedures the banned patron believed he should have. *Id.* at 1057. The court reasoned, given the balance between the "government's significant interest in maintaining the peaceful character of the library" and the plaintiff's "limited liberty interest," that adequate procedural protections had been provided where he received written notice that he was banned from the premises, was told the reason why, and was

[2] While Segaline's harassing behavior was not alleged to be explicitly sexual or racial harassment, this case nevertheless established that employers should be proactive in protecting employees. *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005) (An employer may be held liable under Title VII for actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it).

provided an opportunity to argue that his rights be restored. *Spreadbury*, 862 F. Supp. 2d at 1057.

Segaline unpersuasively relies upon several Sixth Circuit cases occurring after 2003 in hopes of convincing this Court that Croft knew the law and the clearly established specific due process he should have afforded to Segaline. Resp't's Br. at 30-33. *Spreadbury* establishes that adequate procedural protections had been provided where an individual receives written notice that he was banned from the premises, was told the reason why, and was provided an opportunity to argue that his rights be restored. No more was required of Croft in L&I's trespass of Segaline. Segaline received written notice (the no trespass notice), the no trespass notice described the reason for the trespass ("disruptive behavior, harassment of staff and failure to follow instructions for contacting the department"), and the no trespass notice provided an opportunity to remedy access ("to have this notice terminated contact David Whittle Electrical Supervisor"). CP 959. Segaline failed to submit proof that the procedures provided to him were constitutionally insufficient. This failure is the direct result of the lack of any case law that would inform every official in Croft's position in issuing the no trespass notice in 2003 that he was knowingly violating the clearly established and specific due process rights of Segaline.

B. Segaline Fails His Burden to Prove That the Issuance of the No Trespass Notice Deprived Segaline of a Liberty or Property Interest

One of the several interests taken into account under the *Mathews v. Eldridge* test is the nature of Segaline's interest. Yet, as the facts establish, because Segaline's ability to obtain permits was not impaired by the no trespass notice, it has little weight in the determination of the process due prior to its issuance. Segaline's ability to obtain permits, administer an electrical business, and earn a profit was not affected by issuing the no trespass notice. Segaline obtained as many permits before as after the no trespass notice was issued. He obtained permits timely even when the trespass notice was in effect. In fact, a permit in August 2003 was processed for Segaline in less than five minutes. Segaline also had two other options to obtain permits, including online or using one of his employees. Segaline never met his burden to come forward with any case law that establishes any deprivation after being a disruptive and harassing patron of the L&I office.[3] Neither his license nor his ability to practice his occupation was ever taken away.

[3] Likewise, Segaline has never provided any case law that clearly established or even remotely establishes that the trespass statute provides a right to a property or a liberty interest in a civil suit.

C. Croft is Entitled to Qualified Immunity as A matter of Law

Croft's issuance of the no trespass notice should be protected. "When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Taylor v. Barkes,* 135 S. Ct. 2042, 2044, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011)). Qualified immunity ". . . gives ample room for mistaken judgments." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). As correctly applied, its broad reach covers whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Here, the trial court ignored the direction offered by the Supreme Court and allowed the jury to impose personal liability on Croft when the challenged acts were anything but "plainly incompetent" or knowingly unlawful. Even if reasonable minds disagree about whether the acts of Segaline would lead to physical threats of violence, there is no debating that L&I employees felt harassed and the L&I office was disrupted by Segaline. The jury agreed when it found no malice on behalf of the L&I employees when the jury denied Segaline's malicious prosecution claim.

It cannot be overlooked that Croft issuing the no trespass notice was not the result of "plain incompetence." Issuing the no trespass notice was the result of a judgment call made by the L&I Director of Safety and Health after reviewing multiple incident reports, interviewing three employees, consulting with two law enforcement agencies, and meeting with Segaline. The overall goal was to protect L&I employees and provide L&I patrons necessary services without disruption. Similarly, Croft did not engage in conduct that was knowingly unlawful. Even if Croft made a mistake in fact or law as to the existence of harassment or the advisability of issuing no-trespass notices, the Supreme Court has emphasized that the standard for qualified immunity "gives ample room for mistaken judgments." *Hunter,* 502 U.S. at 229.

Segaline erroneously claims the trial court identified a clearly established right—the right to enter L&I and conduct business in public place created for the licensee. Rspn't's Br. at 16. However, the Court "hesitated to say that I've got this absolutely worked out in my own mind, but I'll tell you in general terms how I see that [there 'is a § 1983 claim' that will go forward]." The claim is "a due process claim under the Fourteenth Amendment, and the issue would be that [Segaline] should be allowed to claim to the jury that he was deprived of a right to conduct business in person by going to the East Wenatchee Department of Labor

and Industries, and further, that the decision to tell him that he could not come there did not allow him . . . an appropriate redress to address that." RP 885-86.

Later upon clarification, the Court ruled, ". . . as a matter of law there is a sufficient factual basis to present the issue [of Croft's entitlement to qualified immunity] to the jury." RP 895. There were no factual disputes about Croft's credentials in work place safety or his actions in issuing the no trespass notice. The trial court erred in not following *Hunter* and giving Croft ample room for mistaken judgments. The trial court erred in failing to apply *Ashcroft* when it overlooked the lack of any evidence of plain incompetence or knowingly violating the law. It was a question of law for the trial court to determine whether Croft was entitled to qualified immunity.

Subsequently, the trial court erred when it allowed the jury to decide the amount of due process required before issuing a no trespass notice, which was issued to prohibit entrance to the L&I office based on prior disruptive and potentially threatening conduct. Whether the law regarding this highly case-specific, due-process question was clearly established is a matter of law properly determined by the court. *Robinson v. City of Seattle*, 119 Wn.2d 34, 66, 830 P.2d 318 (1992).

As discussed in Croft's opening brief, the case of *Vincent v. City of Sulphur*, 28 F. Supp. 3d 626 (W.D. La. 2014), demonstrates that there was no clearly established right to specific due process before issuing a no trespass notice. To the extent Segaline suggests that *Vincent* involved only a private bank, he is mistaken. *See* Resp't's Br. at 18. Although the originating incident occurred in a private bank, the plaintiff in *Vincent* was in fact trespassed from city-owned public property (including city hall, city council chambers/building, the court house, and the police department. *Vincent v. City of Sulphur*, 805 F.3d 543, 545 (5th Cir. 2015). If anything, the facts in *Vincent* regarding the location of the incident, which did not involve a disruption on public property before the plaintiff was trespassed, show even more clearly that Croft's action were not contrary to clearly established law.

Further, Segaline's argument that *Vincent* is not applicable because Segaline had not acted physically violent or explicitly threatened a violent act are misplaced. *Vincent* does not stand for the proposition that specific due process rights are based on whether physical threats are made. Rather, the case established that the level of specificity needed to put beyond debate what process was due was lacking because no pre-existing case mirrored the facts or even addressed the actual procedural due process

required. *Vincent,* 805 F.3d at 548. *Vincent* thus supports Croft's entitlement to qualified immunity as a matter of law.

Likewise, *McGee v. Bauer,* 956 F.2d 730 (7th Cir. 1992), also supports Croft's entitlement to qualified immunity. In *McGee*, a building inspector was granted qualified immunity even after excluding the plaintiff from his own home for seven days, which is a deprivation of a substantial property interest. While it is true that in *McGee* the court relied on the fact that even if notice of a post-deprivation hearing was required, the building inspector was not the person required to give the notice, the court also relied on the failure of the plaintiff to provide precedent showing a due process violation in similar circumstances. "McGee cites no case indicating that a building inspector or other similar official must provide notice of a right to a hearing. In addition, . . . Bauer's initial decision to attach the stickers is not constitutionally problematic. Bauer is hence protected by qualified immunity." *McGee*, 956 F.2d at 738. Similarly here, Segaline provides no precedent that providing a no trespass notice to a disruptive customer at a permit office, with instructions to call in order to discuss having the no trespass notice lifted, violates due process.

D. The Trial Court Failed to Define the Terms of Due Process in Jury Instruction No. 13

The determination of what process is due is a question of law for a court to decide. *McGee,* 956 F.2d at 735; *see also In re Welfare of A.G.,* 160 Wn. App. 841, 844, 248 P.3d 611, 613 (2011); *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.,* 128 Wn. App. 317, 321, 116 P.3d 404, 406 (2005) (due process is a legal question). The trial court failed to instruct the jury on what process, if any, is due under the Constitution for the issuance of a no trespass notice from a government permitting office. CP 832. Segaline does not deny that the jury was asked to make a legal determination in applying a *Mathews v. Eldridge* analysis to determine what process was due. Resp't's Br. at 44. Nor does he deny that this is an error of constitutional magnitude.

Nowhere in Jury Instruction No. 13 is due process ever defined. Some of the basic elements of the legal concept of due process were provided, i.e., it is a "flexible concept" and "procedures depend on the facts." CP 832. Likewise, the jury was told to consider "notice and opportunity to be heard available to remedy any wrongful deprivation." CP 832. However, nowhere in Jury Instruction No. 13 is the jury told the amount of process required for the issuance of a no trespass notice. The errors magnify from there.

Jury Instruction No. 13 also instructed the jury to ". . . not consider issues as to the legalities or the form of the [no trespass notice]." CP 832. The same instruction contradictorily instructed the jury "[y]ou should also consider whether there was notice and opportunity to be heard available to remedy any wrongful deprivation." CP 832. This is problematic given the no trespass notice contained the remedy provision to allow Segaline to return. But the jury was instructed not to consider any legalities contained in the no trespass notice. Instead, the jury was left to muddle through the amount of constitutionally sufficient due process.

In addition, Segaline's complaint that Croft did not preserve this issue is unfounded. Croft objected to Jury Instruction No. 13, proposed a jury instruction No. 3 that defined due process, and took exception to the instructions provided. Yet, the trial court incorrectly allowed the jury to determine what process should have been afforded to Segaline.

1. Croft Provided a Jury Instruction That Defined Due Process

Defendants' proposed jury instruction Nos. 1-3 provided what process was due in relation to the issuance of a no trespass notice. CP 445-46. Croft's Jury Instruction No. 3 provided:

> Establishing a cause of action under Section 1983 for violation of a right to procedural due process, requires proof of the following elements: (1) A liberty or property interest protected by due process; and (2) Deprivation of due process. Due process includes a procedure to appeal.

> Providing Mr. Segaline with an explanation of how to have the trespass notice removed would satisfy due process.

CP 446. Instead, the jury was merely instructed that "[d]ue process is a flexible concept and that the procedures depend upon the facts of a particular circumstance." CP 832. Even if Croft's proposed instruction was incorrect (as Segaline argues), Croft preserved the error by proposing instructions 1-3 because Croft met the requirement to apprise the trial court of the issue to define due process.

2. Croft Preserved the Error in Jury Instruction No. 13 When He Argued That the Instruction Failed to Define Due Process

Civil Rule 51 requires "[t]he objector [to] state distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." CR 51(f). The rule is intended to assure that the trial court is sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 1 P.3d 579 (2000), *review denied*, 142 Wn.2d 1010, 16 P.3d 1263 (2000).

Croft took exception to the lack of a definition of due process in Jury Instruction No. 13. RP 1033. Specifically, he took exception that the instruction invited a need to define the terms of due process. RP 1033. This was more than a general exception. *See, e.g., Wallin v. Massachusetts Bonding & Ins. Co.*, 152 Wn. 272, 277 P. 999 (1929); *Wintermute v. Dep't of Labor & Industries*, 183 Wn. 169, 48 P.2d 627 (1935) (general exceptions are insufficient). Here, the trial court was sufficiently apprised of the alleged error (due process was not defined) and was afforded an opportunity to correct the error (provide Croft's Jury Instruction No. 3). Croft argued that what process was due should be decided by the Court rather than the jury. RP 1033. In addition, the court was also alerted to the error in Jury Instruction No. 13 by Croft's exception to the failure to give his proposed Jury Instruction No. 3, which did in fact define the process due. CP 446; RP 1032-33.

3. Allowing the Jury to Decide an Issue of Law is Contrary to the State Constitution and Reviewable Under RAP 2.5(a)

In the alternative, because Jury Instruction No. 13 required the jury to make the constitutional determination of what amount of process was due for the issuance of a no trespass notice, the error was of constitutional magnitude, because under the Washington State Constitution, article 4, section 16, questions of law must be decided by the court.

See also RCW 4.44.080 (questions of law to be decided by the court). Pursuant to RAP 2.5(a), errors of constitutional magnitude may be heard for the first time on appeal. Even if Croft did not preserve objections to Jury Instruction No. 13, impermissible ceding of legal determination to the jury, RAP 2.5(a), permits this constitutional issue to be heard for the first time on appeal. RAP 2.5(a); s*ee also*, Wash. Const. art. IV, § 16; RCW 4.44.080 (questions of law to be decided by court).

V. CONCLUSION

Quite simply, there was no case law in 2003 clearly establishing for Croft the amount of process that was due for the issuance of a no trespass notice in a government permitting office. Because the determination of what process is due is context specific under the multifaceted *Mathews v. Eldridge* test, the outcome of the analysis must be determined case by case based upon the balancing of interests. Analogies to libraries, schools, and parks are inapposite. Segaline had the burden of demonstrating that the law was clearly established by citation to closely analogous case law. As such case law does not exist, he failed to meet his burden. Even the trial judge did not determine the amount of process due for the issuance of a no trespass notice (presumably an easy task if it was "clearly established".) Instead, he left that issue for the jury to decide, which was a violation of the Washington State Constitution

requirement that judges decide the law not juries. Based upon Croft's entitlement to qualified immunity, the judgment against him should be vacated. In the alternative, a court must determine what amount of due process Segaline was entitled to in 2003 for being trespassed from a government permitting office, and the jury should be properly instructed under that legal standard in a new trial.

RESPECTFULLY SUBMITTED this 14th day of September, 2016.

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s\Patricia D. Todd
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